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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1194. 85

J. BUCKNER FISHER, Receiver of The First National Bank
of Chattanooga, Tennessee, Petitioner,

v.

LOUISE WHITON, Executrix of the Estate of Annie R.
Nottingham, Deceased;

O. B. WUNSCHOW, Executor of the Estate of Mildred
Williams, Deceased;

GEORGE C. MCKENZIE, Receiver and Commissioner for
R. A. LOWERY, J. A. LOWERY AND KATHERINE TULLOCK,
children of CLARA LOWERY; et al.

**BRIEF OF COMPTROLLER OF THE CURRENCY, AS
AMICUS CURIAE, IN SUPPORT OF THE
PETITION OF J. BUCKNER FISHER, RECEIVER OF
THE FIRST NATIONAL BANK OF CHATTANOOGA,
FOR RECONSIDERATION OF THE DENIAL OF
THE PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF STATE OF TENNESSEE.**

GEORGE P. BARRE,
*General Counsel for the
Comptroller of the Currency,*



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Comes now Preston Delano, as Comptroller of the Currency of the United States, and, by leave of Court first had and obtained, files this, his brief, as amicus curiae, in support of the petition of J. Buckner Fisher, as Receiver of The First National Bank of Chattanooga, Tennessee, for

reconsideration of the denial by this Court of the original petition of said Receiver for writ of certiorari to the Court of Appeals of the State of Tennessee.

I

PRELIMINARY STATEMENT.

The record discloses (R. 8-9), and the Receiver's petition for writ of certiorari states (pp. 3-4) that on April 19, 1934, the Comptroller of the Currency levied an assessment against the stockholders of The First National Bank of Chattanooga, payable on May 26, 1934, and that by appropriate orders entered, respectively, on May 17, 1934, June 19, 1934, June 22, 1934, and March 11, 1935; the original maturity date of May 26, 1934 on which said assessment first became due, was extended so as to render said assessment payable on April 15, 1935.

The record discloses (R. 85, 86, 87) and the Receiver's petition for writ of certiorari states (pp. 6-7) that the trial court held, in effect: that the Receiver's cause of action to enforce collection of said assessment "accrued at the time first fixed by the Comptroller on May 23, 1934" (the correct date was May 26, 1934, R. p. 8) and not on April 15, 1935 (the date for payment ultimately fixed); that the State statute of limitations began to run from said first maturity date of May 26, 1934, and not from said last maturity date of April 15, 1935; and consequently that the Receiver's claim against the Estate of C. C. Nottingham was barred under the provisions of Section 8225 of the Code of Tennessee (Appendix, p. 17, Receiver's petition for writ of certiorari) inasmuch as the cross bill of the Receiver to establish said assessment claim against said estate had not been filed until August 2, 1935, and therefore had not been filed within the period of six months from the date of accrual of said cause of action as required by said Section 8225 of said Code.

The record further discloses (R. 90) and the Receiver's petition for writ of certiorari states, (p. 7) that the Court of

Appeals affirmed the opinion and decision of the trial court and held that the Receiver's cause of action upon said assessment claim against said estate was barred under the provisions of said Section 8225 of said Tennessee Code.

For convenience of consideration, the question presented, as set forth on page 8 of the Receiver's petition for writ of certiorari, is herewith quoted:

"THE QUESTION PRESENTED."

"Did the receiver's cause of action upon the assessment claim accrue on May 26, 1934, the date first fixed by the Comptroller of the Currency for the payment of said assessment, or did the Comptroller, by appropriate orders from time to time entered, have authority, under the national banking laws, to extend the time of payment to April 15, 1935, the maturity date fixed by the last order of the Comptroller?" (R. 8-9)

"The cross bill asserting said assessment claim against said estate of C. C. Nottingham was filed on August 2, 1935. (R. 6) Hence, if the Comptroller of the Currency was without authority to extend the date of payment to April 15, 1935, the assessment claim was barred under the provisions of said section 8225 of the Tennessee Code of 1932. If the Comptroller did have authority to make such extensions, the claim was not barred."

II.

ADDITIONAL IMPORTANT FACTOR CONCEDED BY RESPONDENT BUT NOT CONTAINED IN THE TRANSCRIPT OF RECORD.

The transcript of record did not disclose, and hence the Receiver in his petition for writ of certiorari did not indicate,—the purpose of, and the reasons for, the several extensions of time for payment of the assessment, granted by the Comptroller of the Currency under the official orders of extension by the Comptroller entered.

As more fully hereinafter indicated and emphasized, the purpose of, and the reasons for, these extension orders, are of impelling weight in the consideration of the Federal

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questions raised, and of the reasons relied upon for the allowance of the writ of certiorari. However, in respondents' brief in opposition to the petition for writ of certiorari, the statements are made:

"The learned Chancellor felt bound by the decision by the United States Court of Appeals in the case of *Coffey, Receiver, v. Fisher* (U. S. C. C. A.), 100 Federal Reporter (2d) 51, involving the identical extensions here under consideration, * * * " (P. 4)

and on pages 5 and 6 of said brief the further statement is made:

"While there is nothing in the record before the Court to indicate why these suspensions were made, yet in *Coffey v. Fisher*, supra, it appears that they were made at the request of certain stockholders being represented by a committee. * * *

As indicated by the foregoing statements, the case of *Coffey v. Fisher* (C. C. A. 6), 100 F. (2d) 51, involved "the identical extensions here under consideration". On page 52 of the reported opinion, the Appellate Court, in referring to said assessment and the extensions of time of payment thereof, and the reasons for said extensions, as disclosed by that record, stated:

"The plaintiff appealed from an order sustaining a demurrer to his declaration. The declaration alleges that he was Receiver of the First National Bank of Chattanooga and that on April 19, 1934, the Comptroller of the Currency levied an assessment against each and every share of its capital stock for 100% of the par value thereof, payable on May 26, 1934; that on May 17, 1934, the Comptroller extended the time for payment subject to further order, and that on June 19, 1934, the time of payment was further extended by the Comptroller until June 26, 1934; that on June 22, 1934, the time was again extended by the Comptroller subject to further order; that these extensions were made at the request of the stockholders through a committee which protested the necessity of the hundred per cent

assessment and requested a reappraisal of the assets of the bank; that finally the reappraisal was completed and the necessity for the assessment was established to the satisfaction of the committee and that the Comptroller then, on March 11, 1935, further extended payment on the assessment to April 15, 1935; that under date of March 13, 1935, plaintiff gave notice of the assessment to all the stockholders including the defendant, J. G. Fisher, Executor of the Estate of S. F. Gettys, deceased."

III. DISCUSSION.

This Court has had occasion, from time to time, to take judicial notice of, and to consider the effect of, the administrative practices and policies of the Comptroller of the Currency. *Inland Waterways Corp. v. Young* (1939), 309 U. S. 517, 524; *Corsicana National Bank v. Johnson* (1919), 251 U. S. 68, 83; *Rawlings v. Ray* (1941), 312 U. S. 96, 99; *American Surety Co. of New York v. Bethlehem National Bank* (1941), 314 U. S. 314.

As hereinafter indicated, it has long been the practice of the Comptroller of the Currency to postpone or extend the time for payment of an assessment previously fixed in the original order of the Comptroller levying the assessment. The number of such extensions are obviously governed by the circumstances in the particular case. Discretion is vested in the Comptroller to determine or fix the date for payment, and, as a necessary incident thereto, to extend the time of payment, or to cancel or revoke the assessment and subsequently re-levy the assessment, or to levy a partial assessment and subsequently levy a further assessment.

It seems obvious that the indulgences and extensions thus granted by the Comptroller by such orders are solely for the benefit of the shareholders, and for the purpose of reducing or ameliorating the hardships of assessment, as well as in the interest of sound business and economic considerations.

That such discretionary authority is vested in the Comptroller, and that it is based upon and supported by sound doctrine, is strikingly indicated by the analogous situation appearing in *Korbly v. Springfield Institution for Savings*, (1917), 245 U. S. 330, where it appeared that the Comptroller of the Currency levied an assessment of 100 per cent upon the shareholders of an insolvent national bank in receivership, and made the same payable on May 15, 1902. Thereupon the shareholders submitted, and the Comptroller approved, a plan for taking up certain of the assets of the insolvent bank in expectation of raising funds to meet its obligations. Approximately two months later, July 22, 1902, the Comptroller, through the Receiver, advised the shareholders that collection of the assessment would be suspended. The voluntary plan thus submitted did not realize the expected amount of funds, and consequently on December 28, 1906 (approximately 4½ years after the first payment date fixed in the original order of assessment), the Comptroller made a second assessment.

Question was raised, *inter alia*; as to the authority of the Comptroller to withdraw the first assessment and to levy the second assessment. In sustaining the action of the Comptroller, this Court said (pp. 333-334) :

"From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. *Studebaker v. Perry*, 184 U. S. 258; *Kennedy v. Gibson*, 8 Wall. 498; *United States v. Knox*, 102 U. S. 422; *Bushnell v. Leland*, 164 U. S. 684; and *Bowden v. Johnson*, 107 U. S. 251. There is nothing in the act to prevent the Comptroller from withdrawing an assessment before it is paid, or when it is partly paid, if it should be concluded that further

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payment is not necessary, and no form is prescribed in which such action shall be taken by him. A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used. The wisdom of giving such large discretion to the Comptroller finds excellent illustration in the case before us. * * * We conclude that the claim that the Comptroller did not have power to recall the first assessment in whole or in part is unsound in principle and wholly unsupported by the terms of the act or by court decisions." (Italics supplied.)

In *Rawlings v. Ray* (1941), 312 U. S. 96, in passing upon a question which was clearly analogous in principle to the question presented in the instant case, this Court said (p. 99) :

"We find no ground for questioning the authority of the Comptroller in making an assessment to fix a later date for its payment. The federal legislation does not impose or suggest any such limitation upon the exercise of his power. 12 U. S. C. 63, 64, 191, 192. What was done in the instant case appears to be in accord with a practice of long standing."

Also see *Rankin v. Barton* (1905), 199 U. S. 228, where this Court sustained the levy of a second or supplementary assessment of \$19.00 per share six years after the levy of the first assessment of \$75.00 per share.

EXISTENCE OF THE PRACTICE.

In *Strasburger v. Schram* (App. D. C. 1937), 93 F. (2d) 246, it appears that the Comptroller extended several times the original date fixed for payment of the assessment levied against the shareholders of an insolvent national bank. The question presented was whether the State statute of limitations started to run on the date on which the assessment was levied, or on the ultimate extended date on which the assess-

ment was payable. In disposing of the question, and in holding that the statute of limitations did not start to run until the extended date of payment, the Court took judicial notice of the long standing practice of the Comptroller of extending the time for payment of assessment. The Court said:

"We take judicial notice of the fact that for many years it has been the general practice of the Comptroller, after determination that an assessment on stockholders in a national bank is necessary and of the amount thereof, to fix a date when payment must be made. The practice is a reasonable one, since it furnishes time and opportunity to the debtor to pay without suit and in some cases opportunity for reorganization and resumption of business; and we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment and to extend it within reasonable limits from time to time. Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed, for the simple reason that until such date the assessment is not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court. This was the view expressed by Judge Sanborn in the case of *Deweese v. Smith*, 106 F. 438. * * * There he said:

'The acts of congress confer the power and impose the duty upon the Comptroller to determine within the statutory limit the amounts that shall be paid by each stockholder upon his individual liability, and the times when he shall pay these amounts. The liability of the shareholder does not mature—does not become due—until the Comptroller adjudges it to be payable and demands it, and it falls due in such amounts and at such times as he decrees.' " (Italics inserted) (p. 248)

JURISDICTION.

Notwithstanding the statement on page 2 of respondents' brief to the contrary,—the question of jurisdiction is "presented" and discussed on pages 9 and 10 of Receiver's petition for writ of certiorari.

FEDERAL QUESTION.

Notwithstanding the statement on page 2 of respondents' brief to the contrary, the existing Federal question is "presented" and discussed on pages 10 and 11 of the Receiver's petition for writ of certiorari. No construction of a State statute is involved. The courts below held, and the Receiver does not deny, that Section 8225 of the Tennessee Code of 1932 applies as a statute of limitations, but the divergence lies in whether that State statute begins to run from the payment date first fixed, or from the payment date last fixed under the orders of the Comptroller. This divergence involves the Federal question of the authority of the Comptroller of the Currency to extend the time for payment of the assessment beyond the date of payment originally fixed, and this in turn involves a construction of the national banking laws.

IV.

CONCLUSION.

Extension of the time of payment of assessment liability beyond the date of payment originally fixed,—is a wholesome practice long followed by the Comptroller of the Currency in the interest of the shareholders of insolvent national banks in receivership. Prior to the decision of the court below there had seemed to be no reasonable doubt as to the discretionary power of the Comptroller to establish and follow this practice as an administrative policy. The decision of the court below does cast serious doubt as to the existence of this authority in the Comptroller, and may well affect recovery upon assessments where such extensions of time have been granted, not only as to existing receiverships but also as to future receiverships. The provisions in the Banking Act of 1933, sec. 22, as amended by the act of Aug. 23, 1935, sec. 304 (U. S. C., title 12, sec. 64a, Appendix, p. 11), for elimination of liability upon shareholders of national bank stock thereafter issued, do not affect national banks placed in receivership during the Banking Holiday

nor banks thereafter or hereafter placed in receivership where there is non-compliance with the requirements for elimination of assessment liability.

In view of the foregoing discussion, and of the considerations presented in the Receiver's petition for writ of certiorari, the Comptroller of the Currency seriously and earnestly feels that the questions presented in the instant case should be passed upon and decided by this Honorable Court, and urges that the petition for writ of certiorari be granted.

Respectfully submitted,

GEORGE P. BARRETT,
*General Counsel for the
Comptroller of the Currency,*

APPENDIX.**U. S. C. Title 12, sec. 64a.**

The additional liability imposed upon shareholders in national banking associations by the provisions of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933. Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937: *Provided*, That not less than six months prior to such date, such association shall have caused notice of such prospective termination of liability to be published in a newspaper published in the city, town, or county in which such association is located, and if no newspaper is published in such city, town, or county, then in a newspaper of general circulation therein. If the association fail to give such notice as and when above provided, a termination of such additional liability may thereafter be accomplished as of the date six month [sic] subsequent to publication, in the manner above provided. (June 16, 1933, c. 89, sec. 22, 48 Stat. 189; Aug. 23, 1935, c. 614, sec. 304, 49 Stat. 708.)



P. 2

SUPREME COURT OF THE UNITED STATES.

No. 85.—OCTOBER TERM, 1942.

J. Buckner Fisher, Receiver of the First
National Bank of Chattanooga, Tennessee, Petitioner,
vs.
Louise Whiton, Executrix of the Estate
of Annie R. Nottingham, Deceased, et al.

On Writ of Certiorari
to the Court of Appeals of the State of
Tennessee.

[December 7, 1942.]

Mr. Justice MURPHY delivered the opinion of the Court.

In *Rawlings v. Ray*, 312 U. S. 96, we decided that state statutes of limitations govern the time within which to enforce the liability imposed upon stockholders of insolvent national banks by assessments levied by the Comptroller of the Currency; that the question as to the time when a complete and present cause of action arises in the receiver to enforce that liability by suit is a federal question; that nothing in the applicable statutes, 12 U. S. C. §§ 63, 64, 191, 192, prevents the Comptroller in making an assessment from fixing a later date for payment; and, that suit cannot be instituted prior to the date fixed for payment and a state statute of limitations does not begin to run until that date. In this case the Comptroller extended the time for payment beyond the date originally set and we must decide whether time runs from the first or the final date fixed for payment.

Petitioner is the successor to the original receiver for the insolvent First National Bank of Chattanooga. On April 19, 1934, the Comptroller of the Currency levied an assessment against the Bank's stockholders for 100% of the par value of their shares, payable on May 26, 1934.¹ By successive orders entered on May 17, 1934; June 19, 1934, June 22, 1934, and March 11, 1935, the original maturity date of May 26, 1934, was extended to make the assessment payable on April 15, 1935. Notice of the assessment was given to all stockholders on March 13, 1935.

¹ This is the date given in the pleadings. However, the opinions of the courts below refer to May 22, 1934, as the first date fixed for payment.

Respondent, as successor to the original executrix, represents the estate of C. C. Nottingham which held stock of the Bank to the extent of \$138,000 par value at the time of the assessment. No steps were taken to enforce against the estate the liability imposed by the assessment until August 2, 1935, when petitioner's predecessor filed an answer and a cross-bill in an action commenced on July 24, 1935, in the Chancery Court for Hamilton County, Tennessee, by the original executrix to require all creditors to appear and establish their claims.

The Chancery Court held that petitioner's assessment claim accrued on the date first fixed for payment, May 23, 1934,² and that the claim was barred by § 8225 of the Tennessee Code³ fixing a period of "six months from the date the cause of action thereon accrued" within which to enforce previously unmatured claims against decedents. The Court of Appeals affirmed, relying upon § 8204 of the Code⁴ as well as § 8225. 155 S. W. 2d 882. The Supreme Court of the State denied a petition for writ of certiorari. The importance of the question in the administration of insolvent national banks⁵ and a conflict with the decision in *Strasburger v. Schram*, 93 F. 2d 246, caused us to grant certiorari.

Our starting point, of course, is *Bowlings v. Ray*, *sapra*. That case adequately disposes of respondent's contention that no federal question is presented by this case; whether petitioner's cause of action was complete on May 26, 1934, or April 15, 1935, is a federal question, 312 U. S. at p. 98, which was duly raised and preserved by appropriate exceptions and assignments of error. And, even as we found nothing in the applicable statutes to question "the authority of the Comptroller in making an assessment to fix a later date for its payment", *id.* at p. 99, we see nothing in the pertinent legislation, 12 U. S. C. §§ 63, 64, 66, 191, 192, forbidding the Comptroller to extend the date fixed for payment within reasonable limits from time to time. Such extensions

² See Note 1, *supra*.

³ Michie's Tennessee Code of 1938, Annotated.

⁴ See, § 8204. Time runs from accrual of right, not demand. When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand.

⁵ The double liability feature of national bank stock has been eliminated, but this does not apply to banks in difficulty prior to July 1, 1937, except as to stock issued after June 10, 1932. 12 U. S. C. § 64(a).

where there has been compliance with the provisions of the statute,

seen to be in accord with a long established practice designed to achieve the desirable result of avoiding excessive and unnecessary assessments.⁶ See *Strasburger v. Bohren*, 93 F. 2d 245, 248. Compare *Kerby v. Springfield Inst. for Seagz.*, 245 U. S. 330, where, in upholding the power of the Comptroller to withdraw one assessment and levy⁷ a later one, we emphasized the desirability of a large measure of administrative discretion and flexibility in the adjustment of assessments to the "exigencies of each case". p. 333.

Since the Comptroller has power to extend the time for payment, respondent was not required to pay until April 15, 1935, and prior to that time suit could not be instituted against her. *Rawlings v. Ray, supra*, p. 98. While the receiver enforces the liability created by the assessment, 12 U. S. C. §§ 191, 192, he does so subject to the direction of the Comptroller, *Kennedy v. Gibson*, 8 Wall. 498, 505. So petitioner did not have a complete and present cause of action until April 15, 1935. Since the words "from the date the cause of action accrued thereon" as used in § 8225 of the Tennessee Code seem to have their usual meaning and refer to the time when suit may be instituted,⁸ it follows that petitioner's claim, filed on August 2, 1935, was in time.

Respondent stresses § 8604 of the Code.⁹ But, as pointed out above, petitioner had no right to demand payment before April 15, 1935, so even if § 8604 applies, it does not bar petitioner's claim.

Respondent mistakenly relies upon *Pufahl v. Estate of Parks*, 299 U. S. 217, which has no application because in that case "we were not considering or deciding the question of the application of a statute of limitations to a suit against a stockholder upon an assessment made by the Comptroller where payment was not required before a specified date, prior to which no suit could be maintained." *Rawlings v. Ray, supra*, p. 99.

⁶ The record does not disclose the reason for the extensions of time here, but it appears that they were made at the request of a stockholders' committee which protested the necessity of a 100% assessment and asked for a reappraisal of the Bank's assets. See *Coffey v. Fisher*, 100 F. 2d 51, 52; involving the same assessment here considered.

⁷ See *Jones v. Whitworth*, 94 Tenn. 602, 616; *Gillespie v. Broadway National Bank*, 167 Tenn. 245, 249; *City of Knoxville v. Gervin*, 169 Tenn. 532, 544.

⁸ See Note 4, *supra*.

Fisher vs. Whilton et al.

We are not unmindful that it is desirable to close decedents' estates speedily but there is no warrant in the federal legislation for allowing that consideration to limit the power of the Comptroller to extend the time for payment of an assessment.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

